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NO. 85-1637

Supreme Court of the United States

OCTOBER TERM, 1985

BUDGET RENT-A-CAR
OF CINCINNATI, INC. ..... APPELLANT

VS.

REVENUE CABINET, COMMONWEALTH
OF KENTUCKY ..... APPELLEE

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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ARGUMENT

There are three questions involved here.

I. STATES' RIGHTS TO LICENSE AND TAX THE USE OF INTERSTATE HIGHWAYS SHOULD BE BROUGHT INTO THE SECOND HALF OF THE TWENTIETH CENTURY

The Commonwealth of Kentucky in its Motion to Dismiss or Affirm [herein Motion] characterizes this issue as involving the question whether Budget may "rent its Ohio-licensed vehicles from its Kentucky outlet without paying tax to Kentucky." [Motion, p. 2]. As has been its custom, the Commonwealth thus mischaracterizes this highway usage tax — as if it were a rental transaction tax. Apart from misstating the question, the Commonwealth's response is threefold:

First. The Commonwealth states that this issue was "not raised by Budget and [has] never been discussed in the proceedings below," and again that the issue was "not raised before." [Motion, pp. 2 and 5].

We find no provision in the Rules of this Court to enter into factual disputes. We can merely represent to the Court that the issue was in fact raised below. The following appeared in our brief to the Supreme Court of Kentucky:

> The general rule is that 'every motor vehicle is taxable.' The very special section – which gives a 'credit' only in the case of a reciprocal tax of another state — applies only in the specifically named conditions. *It does not apply to Ohio residents, whether they work in a factory, practice law, or lease vehicles to customers.* We do not know how many states are like Ohio. If the Revenue Cabinet is correct in its reading of the statute, all their citizens are subject to tax at the Ohio River bridges.
>
> Need we point out that such a construction of the statute would be blatantly unconstitutional? If there were a matter of double taxation, the problem could be solved by a 'credit.' But it is a matter of an obviously unreasonable burden on interstate travel and commerce. *Kane* v. *State of New Jersey,* 242 U.S. 160 (1916) does not validate an unreasonable tax. *Id* at 168. See *Massachusetts* v. *United States,* 435 U.S. 444 (1978) at 463. We presume that the Revenue Cabinet does not argue that a $500 tax on a vacation trip by the owner of a $10,000 car would be 'reasonable for the privilege granted.'

The Commonwealth of Kentucky said in its brief that it was an "historical aside" that this Court "once ruled that a state may require registration of all

vehicles — even those registered elsewhere," citing *Kane*.[1]

It is our respectful contention that the "historical aside" needs to be brought into the modern era.

Second. The Commonwealth suggests that Budget has no standing to question the "first alternative" tax, because it is not "one of those hypothetical non-residents who was stopped and forced to pay the tax." [Motion, p. 6] The facts, again, belie the Commonwealth's argument. Everyone in Budget's business, including Budget, is "stopped and forced" to "pay the tax" — or elect to pay an alternative tax. The "first alternative" tax is inextricably connected with the "second alternative" taxing scheme. Furthermore, this Court has recently held that the standing of a party to raise such a constitutional issue is not dependent upon so direct an application to the appellant. *Williams* v. *Vermont*, 105 S.Ct. 2465 (1985).

This Court is not likely soon to find another case where these intertwined Constitutional issues can be considered in a single opinion.

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[1]In the Commonwealth's very first brief to the Kentucky Board of Tax Appeals, it conceded the applicability of an old Kentucky case, now apparently overruled, which had held that Kentucky could not register and charge a fee to "non-residents temporarily operating in Kentucky." *Reeves* v. *Deisenroth*, 157 S.W.2d 331 (Ky. 1941). The Supreme Court of Kentucky (then the Court of Appeals) carved down a statute "by indirection," applying what it referred to as "the doctrine of comity between states." *Id* at 335.

Third. The Commonwealth argues that this issue "was decided purely under state law . . . since it involves only state law." [Motion, p. 2]. Mr. Justice Brandeis in *Kane* was declaring federal Constitutional law. If the Supreme Court of Kentucky truly misunderstood this, its error is established — and enormous.

II. THE DIRECT TAXATION BY A STATE OF THE USE OF ANOTHER STATE'S HIGHWAYS SHOULD BE PREVENTED, AND BRADY CLARIFIED.

One of the Commonwealth's contentions is that "this Court has ruled that a state may ignore mileage completely in evaluating the apportionment prong of the *Complete Auto Transit* [v. *Brady*] test." [Motion, p. 5]. To support the notion that the Court "has ruled" on "the apportionment prong" of the *Brady* test, the Commonwealth cites *Brice* — which was decided twenty-seven (27) years before *Brady*. This Court is thus granted a prescience which it surely does not claim. And *Brice* does not stand for the rule stated by the Comonwealth.

The Commonwealth also argues that "[s]ubsequent cases discussing *Complete Auto Transit* [v. *Brady*] have indicated that it applies to all types of interstate commerce, including use of highways." [Motion, p. 4]. The Commonwealth's problem is that the case of *Massachusetts* v. *United States*, 345 U.S.

444 (1978) cited *Brady* only for the "general" applicability of the Commerce Clause to enactions of states. *Id.* at 462. When this Court turned to the appropriate application of a "flat annual fee," it cited not *Brady* but *Brice* as an "analogous context." *Id.* at 463. *Massachusetts* v. *United States*, then, is worth noting as one occasion when this Court has suggested that highway usage cases are *not* to be treated under the *Brady* test. That suggestion should be the central focus of a full opinion in this case.

III. ELEMENTARY FAIRNESS REQUIRES THAT NO JUDICIAL DECISION BE BASED ON A COURT-CREATED "FACT."

The Commonwealth does not dispute the fact that the Supreme Court of Kentucky has invented a fact upon which it could base its decision. Nor does the Commonwealth dispute the applicability of the law we have cited.

The sole reply of the Commonwealth, then, is that as a Constitutional matter this issue was "not raised by Budget and [has] never been discussed in the proceedings below." [Motion, p. 2]

The Commonwealth's problem is that Budget's Constitutional rights were not violated until the Supreme Court of Kentucky created the new fact. We certainly pointed out to the Supreme Court of Kentucky that we had made no election to be treated under the Revenue Cabinet's version of the "second

alternative" tax. We represent that to this Court. But there was no way at that time we could have known that the Supreme Court of Kentucky would deny us due process of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief Opposing Motion to Dismiss or Affirm was served this 13th day of May, 1986, in compliance with Rules 16 and 28 of the Supreme Court of the United States, by depositing three copies of same in a United States post office or mailbox, with first-class postage prepaid, addressed to the following: Hon. Ross T. Carter, Legal Services Section, Revenue Cabinet, P.O. Box 423, Frankfort, Kentucky 40602 and Hon. David L. Armstrong, Attorney General, Office of the Attorney Genderal, 116 Capitol Building, Frankfort, Kentucky 40601. All parties required to be served have been served.

Robert S. Miller

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